

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

LARRY JUNIOR JENKINS,

Petitioner,

v.

Civil Action No. 2:05cv92

THOMAS McBRIDE,

Respondent.

ORDER

It will be recalled that on January 25, 2007, Magistrate Judge Seibert filed a Report and Recommendation in the above-styled action, and then filed a Supplemental Report and Recommendation on March 2, 2007. In each Report and Recommendation, the Petitioner was directed, in accordance with 28 U.S.C. § 636(b)(1), to file with the Clerk of Court any written objections within ten (10) days after being served with a copy of the Report and Recommendation. No objections to the Magistrate Judge's Report and Recommendation have been filed.

In his first Report and Recommendation, Magistrate Judge Seibert recommends granting in part and denying in part Respondent's Motion to Dismiss Petitioner as Untimely and recommends the dismissal with prejudice of grounds one, two and four of the Petition For Writ of Habeas Corpus for being untimely filed. However, recognizing that there was a matter pending before the United States Supreme Court, Whorton v. Bockting, Docket No. 05-595, that would effect whether ground three should be dismissed with or without prejudice, Magistrate Judge Seibert recommended staying consideration of ground three. On February 28, 2007, the United States Supreme Court issued an opinion in Whorton finding that Crawford claims (Crawford v. Washington,

541 U.S. 36 (2004)) are not retroactive to cases on collateral review. Accordingly, Magistrate Judge Seibert issued his Supplemental Report and Recommendation recommending that Respondent's Motion to Dismiss Petition as Untimely be granted in its entirety and that ground three be dismissed with prejudice as untimely.

Upon examination of the reports from the Magistrate Judge, it appears to the Court that the Respondent's Motion to Dismiss Petition as Untimely and the issue of Petitioner's timeliness in filing his Petition For Writ of Habeas Corpus, filed pursuant to 28 U.S.C. §2254, was thoroughly considered by Magistrate Judge Seibert in his Report and Recommendations. Moreover, the Court, upon an independent de novo consideration of all matters now before it, is of the opinion that the Report and Recommendations, read together, accurately reflect the law applicable to the facts and circumstances before the Court in this action. Therefore, it is

**ORDERED** that Magistrate Judge Seibert's Report and Recommendation of January 25, 2007 be, and the same hereby is, accepted in its recommendation of dismissal of grounds one, two and four of the Petition; that Magistrate Judge Seibert's Supplemental Report and Recommendation of March 2, 2007 be, and the same hereby is, accepted in whole; and that this civil action be disposed of in accordance with the recommendation of the Magistrate Judge. Accordingly, it is

**ORDERED** that Respondent's Motion to Dismiss Petition as Untimely shall be, and the same hereby is, **GRANTED**. It is further

**ORDERED** that the Petition of Larry Junior Jenkins, filed pursuant to 28 U.S.C.

§2254, shall be, and the same hereby is, **DENIED** with prejudice as untimely. It is further **ORDERED** that the above-styled action shall be, and the same hereby is, **DISMISSED** with prejudice and **STRICKEN** from the docket of this Court. It is further **ORDERED** that the Clerk shall enter judgment for the Respondent. It is further **ORDERED** that, if Petitioner should desire to appeal the decision of this Court, written notice of appeal must be received by the Clerk of this Court within thirty (30) days from the date of the entry of the Judgment Order, pursuant to Rule 4, Federal Rules of Appellate Procedure. The \$5.00 filing fee for the notice of appeal and the \$450.00 docketing fee should also be submitted with the notice of appeal. In the alternative, at the time the notice of appeal is submitted, Petitioner may, in accordance with the provisions of Rule 24(a), Federal Rules of Appellate Procedure, seek leave to proceed in forma pauperis from the United States Court of Appeals for the Fourth Circuit.

**ENTER:** March 22<sup>nd</sup>, 2007

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**/s/ Robert E. Maxwell**  
United States District Judge